KFC TECHNICAL SERVICES SDN. BHD.

v.

THE INDUSTRIAL COURT OF MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. EUSOFF CHIN J
[ORIGINATING MOTION NO. R8-25-83-89]
24 MAY 1991

LABOUR LAW: *Certiorari - Retrenchment - Finding by Industrial Court that action of company tainted with mala fides - Award of compensation of 2 months salary for each year of service - Whether Industrial Court was justified in doing so - Discretion of Court - Industrial Relations Act 1967, ss. 9(2), 10, 26(2), 30.*

Fulcrum Sdn. Bhd. (F) had employed 29 workmen in its maintenance division. In 1986, the majority of the workers of F who were eligible for membership joined the Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan (the Union). The union sought recognition from F and F in turn sought the advice of the Director General of Industrial Relations (DGIR).

F called a meeting of its employees prior to receiving a reply for the DGIR and issued retrenchment notices to all its employees who were union members. Employees who were not union members were not so served.

After a complaint was lodged with the DGIR, F agreed to reinstate the retrenched employees. F changed its name to Kentucky Fried Chicken (KFC) Technical Services Sdn. Bhd. (KFCTS) (the applicant). KFCTS informed the union that it was closing its maintenance division since it was not economic to maintain this division and that the services of all the employees in that division would be terminated.

Upon representation made by the union, the Minister acting under s. 26(2) of the Industrial Relations Act 1967 (IRA) referred the representation to the Industrial Court. The Industrial Court decided that the whole exercise of the company was tainted by *mala fides* compounded with management ineptitude and ordered the company to pay 2 months salary for each year of service as compensation.

This was the company's application for an order of *certiorari* to quash the said award and in the alternative for an order of *Certiorari* to quash that part of the award on punitive compensation.

Held:

[1] The company removed the claimants in haste and then looked for a way out when it found it had infringed the law. The removal of the union was the main concern of the company at the time. The inevitable conclusion must be that the dismissals were effected without just cause or excuse.

[2] The closure of the maintenance division company was not for a genuine purpose, nor was the contracting out of the company's business for good and *bona fide* reasons.

[3] The Industrial Court had inquired into the reason given by the appellant for the closure of the maintenance division, and found that the true reason for the closure was that the appellant wanted to get rid of the Union. The appellant had acted *mala fide* and the dismissals of the 19 workmen who were union members were done without just cause or excuse.

[4] The Industrial Court had also correctly decided that it was not possible to order the appellant to reinstate the dismissed workmen.

[5] The question of amount of compensation payable to a dismissed employee was a matter for the discretion of the Industrial Court. The Industrial Court had correctly made the order of payment of compensation to the dismissed employees and having regard to the reasons and circumstances leading to the dismissal of the employees the award of 2 months salary for each year of service was justified.

[Application dismissed with costs.]

[**Ed note:** The applicant has appealed to the Supreme Court.]

Cases referred to:
Hotel Continental Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Worker [1983] 2 ILR 124 ***(cit)***
Kalinga Tubes Ltd. v. Their Workmen [1909] AIR ***(cit)***
District Labour Association Calcutta v. Ex-Employees of Tea District Labour Association & Anor. [1960] A1R SC 815 ***(cit)***
Goon Kwee Phoy v. J & P Coats (M) Bhd. [1981] 2 MLJ 129 ***(foll)***
Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***
Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1980] 1 MLJ 109 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 9(2), 10, 26(2), 30
Industrial Disputes Act 1947 [India], s. 25 FFF

For the appellant - V.T. Nathan (Peh Lee Kheng with him); M/s. Shearn Delamore & Co.
For the 2nd respondent- Gengadharan; M/s. Genga, Maha, Wong & Co.

JUDGMENT

Mohd. Eusoff Chin J:

On 8 July 1989, the applicant filed an application in the High Court for an order of *certiorari* to quash Industrial Court Award No. 83 of 1989 [1991] ILR 535 and in the alternative for an order of *certiorari* to quash that part of the award on punitive compensation. On 19 July 1990 I dismissed the application with costs. The applicant filed an appeal to the Supreme Court.

The facts show that Fulcrum Sdn. Bhd. (Fulcrum) had employed 29 workmen in its maintenance division to carry out its principal business activity of repairing and maintaining all machineries (including motor vehicles) and equipment at the various Kentucky Fried Chicken (KFC) restaurants, processing plants and offices of the KFC group of companies. In October 1986, the majority of the workmen eligible for membership joined the Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan (2nd respondent, hereinafter referred to as "the union").

In late October 1986, the union sought recognition from Fulcrum pursuant to s. 9(2) of the Industrial Relations Act 1967.

By letter dated 21 November 1986, Fulcrum sought the advice of the Director General of Industrial Relations (DGIR) whether, the union was eligible to represent Fulcrum's employees. But before receiving the reply from the Director General of Industrial Relations, Fulcrum called its employees for a meeting on 29 November 1986. At the meeting Fulcrum issued retrenchment

notices dated 28 November 1986 to all its employees who were union members. Employees who were not union members were not served with the retrenchment notices. These employees who were served with the notices were required to stop work with effect from 1 December 1986, and that they would be given one month's wages in lieu of notice.

The retrenched employees made a complaint to the Director General of Industrial Relations on 1 December 1986. Since Fulcrum had committed a breach of s. 10 of the Industrial Relations Act 1967, Fulcrum at a meeting at the Ministry of Labour agreed to reinstate the retrenched employees. This was followed by an undated letter signed by Fulcrum's personnel manager C.H. Pook to all the retrenched employees stating that Fulcrum had granted permission for them to go on special leave with effect from 15 December 1986 until further notice.

Fulcrum changed its name to KFC Technical Services Sdn. Bhd. (appellant), and on 29 December 1986 the appellant accorded recognition to the union.

The appellant then held a meeting with a representative of the union on 17 February 1987 and informed the union that the appellant was closing its maintenance division since it was not economic to maintain this division and that the services of all the employees in that division would be terminated effective on 26 February 1987. Appellant then sent a letter dated 23 February 1987 to the Director General of Industrial Relations informing him of the appellant's decision with a copy to the general secretary of the union.

Upon representation made by the union, the Minister on 25 June 1987, acting under s. 26(2) of the Act referred the representation to the Industrial Court to determine whether the 19 employees had been dismissed without just cause or excuse. The Industrial Court made an award. For ease of reference, I produce part of the Industrial Court's Award No. 83 of 1989 [1989] 1 ILR 535 which is as follows:

> As a threshold observation based on an analysis of the evidence adduced in the trial, the members of this Court are of one mind that the whole exercise of the company was tainted by *mala fides* compounded with management ineptitude. No reasonable group of persons who have become aware of the series of events (which are undisputed facts) as stated at the beginning of this award, as well as the circumstances elicited as surrounding those facts, would be so naive as to believe that the dismissals of the claimants were based purely on genuine closure and retrenchment for business reasons or that the said dismissals were not coloured by ulterior motives as the company would have it believed. On the basis of this preliminary finding alone, the Court is able to say that the claimants had a right to consider themselves dismissed without just cause.
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> The circumstances of the first dismissal of the 19 claimants, according to Encik Choong Kooi Kong (Choong) the Technical Manager of KFC Holdings Sdn. Bhd. (KFCH), under whose supervision and management the company came, are these:
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> > The message was passed down to the workers that there was a compulsory meeting at 4.30 p.m. on 29 November 1986. The Personnel Manager (that is, the KFCH Group Personnel Manager Encik George Teng, Company Witness CW1) addressed them in my presence.
> >
> > A Sikh and group from the Police Department were on standby to prevent mishap. We requested Police through the Security Officer. After the meeting we gave the Policemen snack vouchers. Retrenchment letters were handed out (to the claimants). They were asked to leave immediately and take their things.
>
> Prior to selection of the 19 claimants for retrenchment, (this witness testified) the 19 claimants were marked to be retrenched on the ground of **redundancy.** He said that at a meeting with workers:

George Tang (the KFCH Group Personnel Manager) said it was not company's idea to get rid of everyone. It was to get rid of employees who were **not efficient and redundant** ... When I say "redundant" I mean not all areas were redundant.

This witness also testified to his own involvement in the episode of the union's claim for recognition:

I told them it was untimely. I did tell them to withdraw from the union and start an in-house union. I told them to start an in-house union so as to speak for themselves. I don't remember who else told them this also.

Union Witness (UW2) Encik M. Arumugan (storekeeper) testified as to who else tried to deter the workers from joining the Union:

After the union's claim for recognition, management called us up one by one. I was called. He (Encik K.K. Choong the General Manager) was curious why we joined the Union.

He said if everyone co-operated, things would be better. K.L. Wong, a supervisor, also spoke to me. He was not happy a third party was coming in and asked us if we would co-operate. This took place in November 1986 .... One meeting K.K. Choong told us to withdraw from union by the end of November, otherwise face consequences.

The consequences evidently were the first round of retrenchment of the 19 claimants. They were, as stated earlier, reinstated on the advice of the Industrial Relations Department. But, according to the testimony of Mr. Pook Khong Hoe the Group Personnel Manager, (CW1):

It was our intention to reinstate the claimants and later to retrench them again.

This intention, of course, became obvious from subsequent events.

But in the second retrenchment exercise the company included those 9 workers who were not retrenched in the first round. This was obviously to colour the picture to show that there was a closure of the entire business which, indeed, is the contention of the company in this Court. The company avers that the entire maintenance service of its operations were contracted out to Innovest Hart Engineering Sdn. Bhd. a member company of the Innovest Group, as are the company and its immediate parent, the KFC Holdings (M) Bhd. Besides stating this fact, the Court will go no further into the complex corporate structure of KFC/Innovest as nothing of consequence would turn on such an exercise in view of the absence of a union application to join any party to the case.

The workers who were said to be non-union members continued to be employed in their jobs, but by whom it was not made clear. The company claimed that they were re-employed onto the payroll of Innovest Hart. The union on the other hand contended that this was not so at least at the material time, and even if they later went onto Innovest Hart's payroll it was just the "right hand giving to the left hand." Be that as it may, the fact is the 19 claimants who were union members remained dismissed after 15 December 1986, and the 9 who were said to be non-unionists enjoyed continued employment.

For the foregoing reasons, this Court agrees with the submission of the union that the company removed the claimants in haste and then looked for a way out when it found it had infringed the law. The removal of the union was the main concern of the company at the time. The inevitable conclusion must be that the dismissals of the 19 claimants were effected without just cause or excuse.

In the present case the original reasons given were redundancy and inefficiency on which ground the claimants were illegally dismissed during the union's claim for recognition, reinstated, and dismissed again after union recognition was given. In the result, the recognition given to the union came to nothing, its members having been evicted from their employment and there

> remained no longer anyone for the union to represent. This was not closure for a genuine purpose, nor was the contracting out of the company's business to Innovest Hart for good and *bona fide* reasons.

Before me the appellant's learned Counsel Encik V.T. Nathan argued that the Industrial Court had taken into consideration and had given more weight to matters which were irrelevant. He submitted that there was in fact a real closure of the appellant's maintenance division. He cited *Hotel Continental Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Worker*, [1983] 2 ILR 124 at 129 where the Industrial Court cited a passage in *Kalinga Tubes Ltd. v. Their Workmen* [1909] AIR Supreme Court 90, as follows:

> ... the closure has to be genuine and *bona fide* in the sense that it should be a closure in fact and not a mere pretence of closure. The motive behind the closure is immaterial and what has to be seen is whether it was an effective one.

Encik Nathan also cited the *District Labour Association Calcutta v. Ex-Employees of Tea District Labour Association & Anor.* [1960] AIR SC 815 which held that where there was no pretence of closure and the undertaking had in fact been closed but the closure was not *bona fide* the consequences would be the liability of the employer to pay the higher compensation under s. 25.FFF of the Industrial Disputes Act 1947 (India). But if the closure was real but is shown to be *mala fide* the Industrial Tribunal's conclusion that the undertaking in the eye of the law should be deemed to continue is not justified, and an award on that basis must be set aside.

In *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 the Federal Court held that where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the Industrial Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court is to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal is without just cause or excuse. The proper enquiry of the Industrial Court is the reason advanced by the employer, and the Industrial Court or the High Court cannot go into another reason not relied upon by the employer or find one for the employer.

In this case the Industrial Court had inquired into the reason given by the appellant for the closure of the maintenance division, and found that the true reason for the closure was that the appellant wanted to get rid of the union. The appellant had acted *mala fide* and the dismissals of the 19 workmen who were union members were done without just cause or excuse. I find the Industrial Court had considered and given weight to matters which are relevant; and I agree with the conclusion reached by the Industrial Court.

The Industrial Court also correctly decided that on the facts, it was not possible to order the appellant to reinstate the dismissed workmen. In *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at 314, the Federal Court held that the Industrial Court may award compensation where the dismissal is without just cause or excuse, if, in its considered view, it does not think re-instatement should be ordered.

Encik Nathan said that the Industrial Court had misdirected itself when it made the order that the appellant was to pay compensation to the dismissed employees amounting to two months' salary for each year of service with the appellant. He said the amount of compensation normally ordered by the Industrial Court is one month's salary for each year of service.

In *Hotel Jaya Puri Bhd. v. National Union of Hotel Bar & Restaurant Workers & Anor.* [1980] 1 MLJ 109 at 113, the Federal Court held that, if there was a legal basis for paying compensation, the question of the amount was very much a matter for the discretion of the Industrial Court to fix under s. 30 of the Act. In that case the Industrial Court had ordered the amount of compensation to be two months' salary for each year of service, but the Federal Court quashed this order because there was no basis to order compensation. This is because the Federal Court had found that the termination of the services of the employees was with just cause or excuse.

I find that the Industrial Court had correctly made the order of payment of compensation to the dismissed employees and having regard to the reasons and circumstances leading to the dismissal of the employees, I think the amount of compensation of two months' salary for each year of service, which the Industrial Court described as punitive compensation, is justified. In the case of *Tea Districts Labour Association, Calcutta* (referred to above) the Indian Supreme Court held at p. 817:

> There has been a closure and the agencies have been closed and their business had been wound up. If it has been found that the closure was not *bona fide* the consequences would be the liability of the employer to pay the **higher** compensation under s. 25.FFF of the Industrial Disputes Act 1947. I therefore dismissed this application with costs.

Also found at [1992] 1 CLJ 437